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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 0 7 2011

IN RE:

Petitioner:

PETITION:

Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration

and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:



#### **INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

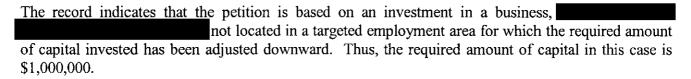
**DISCUSSION:** The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) affirmed the director's decision on certification. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The director determined that the petitioner had failed to demonstrate a qualifying sustained investment in a new commercial enterprise. The director certified the decision denying the petition to the AAO pursuant to 8 C.F.R. § 103.4. The AAO withdrew the director's concern that the commercial enterprise was not "new" as defined at 8 C.F.R. § 204.6(e). The AAO also rejected the director's concern that the losses reflected on certain tax returns demonstrated that the petitioner was not sustaining his investment in the new commercial enterprise. Nevertheless, the AAO upheld the director's ultimate conclusion that the petitioner had not sustained his investment based on bank statements showing withdrawals of funds from the new commercial enterprise's account. The AAO also questioned whether the employment creating entity was still a wholly owned subsidiary of the new commercial enterprise.

On motion, the petitioner submits documentation explaining the withdrawal of funds. Counsel further asserts that the employment creating entity is an "affiliate" of the new commercial enterprise, a relationship that the regulations do not prohibit. For the reasons discussed below, the petitioner has now overcome the AAO's concerns about the withdrawal of funds. Nevertheless, counsel's assertions about the affiliate nature of the employment creating entity confuse the structure of the business with the relationship of the business to the new commercial enterprise and, thus, are not persuasive.

Section 203(b)(5)(A) of the Act, as amended by the 21<sup>st</sup> Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
- (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).



### **INVESTMENT OF CAPITAL**

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.

\* \* \*

*Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

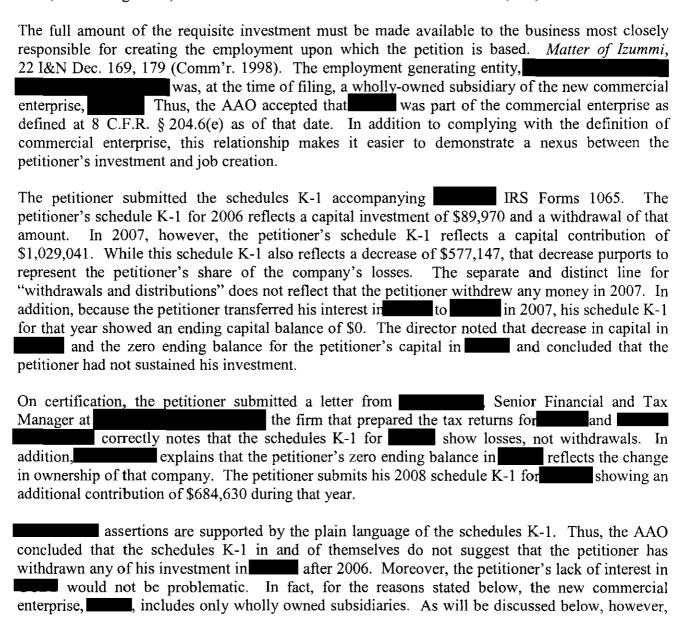
The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

- (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
  - (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
  - (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
  - (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
  - (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or

nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The petitioner indicated on the Form I-526 petition, Part 3, that he made an initial investment of \$175,000 on August 24, 2005 and that he had made a total investment of \$1,029,070.84.



is no longer a wholly-owned subsidiary of and, thus, is no longer part of the new commercial enterprise.

While the AAO concluded that the losses and transfers of capital from the subsidiary to the new commercial enterprise were not disqualifying, the AAO raised concerns about the transfer of funds represented on certain bank statements. The relevant bank statements reflect that as of June 22, 2007, the petitioner had transferred \$555,001 to As of September 28, 2006, the petitioner had transferred \$650,000 to which went towards the construction of the restaurant. On June 28, 2007, however, transferred \$1,000,000 to the petitioner's checking account. On the same date, he transferred those funds (in two transfers of \$500,000 each) to his own personal money market savings account. On July 12, 2007, the petitioner transferred the same amount (in two transferred \$1,000,000 each) back to his checking account. On the same date, the petitioner transferred \$1,000,000 to an unknown checking account. The AAO reviewed checking account statement for July 2007, which did not reflect that was the recipient of the \$1,000,000 transfer. Thus, the AAO concluded that the beneficiary of the July 12, 2007 transfer of \$1,000,000 from the petitioner's checking account is undocumented.

On motion, counsel asserts that the petitioner spent more than \$1,000,000 on construction and other costs; thus, "it is not logically feasible" to conclude that the petitioner did not sustain his investment. Counsel notes that is a holding company that serves to manage investments other than Counsel asserts that the petitioner took out a loan in June 2007 by refinancing his condominium and transferred those funds to account to demonstrate sufficient funds for the construction of a new restaurant in Florida. Once the construction company was satisfied that the petitioner had sufficient funds, the petitioner transferred those funds to higher interest bearing accounts. Counsel asserts that these funds are unrelated to the petitioner's investment in benefitting

The petitioner submitted evidence of the refinancing, relevant bank statements and other evidence supporting counsel's assertions. Thus, we concur that these funds are unrelated to the investment in through

## **COMMERCIAL ENTERPRISE**

The regulation at 8 C.F.R. § 204.6(e) provides:

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

#### (Emphasis added.)

On motion, counsel asserts that the petitioner owns 90 percent of both and and making the two companies "affiliates." As noted by counsel, the petitioner previously submitted the management agreement through which manages corporation. Counsel states that an affiliate is a corporation related to another corporation by shareholding or other means of control, a subsidiary or sibling corporation. Counsel further notes that affiliates are viable and qualifying corporate entities for another immigrant classification pursuant to section 203(b)(1)(C) of the Act.

Counsel concludes that the "not limited to" language in the definition of commercial enterprise at 8 C.F.R. § 204.6(e) reveals that affiliates may be included as qualifying commercial enterprises. Counsel further asserts that the same definition excludes non-commercial activities but not affiliates. Finally, counsel asserts that the change in ownership is not a material change precluded under *Matter of Izummi*, 22 I&N Dec. at 175.

On November 10, 2010, the AAO requested the complete 2009 tax returns, including all schedules K-1, for both and and the East The petitioner submitted the requested documents, which confirm that the petitioner owns 90 percent of both companies. It does not own any of the East Thus, is not even a partially-owned subsidiary of the East Thus, and the East Thus, are the complete 2009 tax returns, including all schedules K-1, for both the East Thus, and the East Thus, are the complete 2009 tax returns, including all schedules the complete 2009 tax returns the complete 2009 tax re

Matter of Izummi, 22 I&N Dec. at 175, addresses the situation where a petitioner makes a material change in an attempt to correct disqualifying factors. That case does not address situations where the employment generating entity was part of the commercial enterprise at the time of filing but is no longer part of the commercial enterprise. We find that is no longer part of the commercial enterprise and, thus, the investment in and employment at can no longer support the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

**ORDER:** The AAO's decision of February 18, 2010 is affirmed. The petition is denied.